



Comptroller General  
of the United States

Washington, D.C. 20548

957222

## Decision

**Matter of:** Deskin Research Group, Inc.

**File:** B-254487.2

**Date:** February 22, 1994

John J. Fausti, Esq., for the protester.  
Charles A. Walden, Esq., Department of Justice, for the agency.  
Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest that procuring agency improperly included the protester's proposal in the competitive range is denied where the protester sought to have its proposal put back in the competitive range after its elimination as technically unacceptable; the protester was fully cognizant that it faced an "uphill battle," as evidenced by its unanswered request, made before its proposal was put back into the competitive range, that the agency change the ground rules of the competition to permit the protester to have an equitable chance for award; and the government's reinstatement of the protester's proposal in the competitive range reflected concern that the soundness of the original technical evaluation had not yet been established.

### DECISION

Deskin Research Group, Inc. protests the inclusion of its proposal in the competitive range under request for proposals (RFP) No. DEA-92-R-0024, issued by the United States Department of Justice, Drug Enforcement Agency (DEA), for radio communications equipment.

We deny the protest.

The DEA issued this RFP on August 21, 1992, to procure high-frequency, single-side-band, secure, radio communications equipment with automatic link establishment under a firm, fixed-price requirements contract. A primary objective of the procurement was to increase the operability and flexibility of the DEA communications network, which DEA had begun addressing by employing automatic link equipment that conformed to Federal Standard 1045; to this effect, among the equipment the RFP specified were the

Rockwell-Collins "Selscan" and the Rockwell-Collins "VP-110" voice privacy equipment. In addition, the RFP required the communications system to be compatible with the existing DEA equipment.

The RFP solicited proposals for a contract period of 1 base year with four successive 1-year option periods. Section M of the RFP provided for award to be made to the offeror whose proposal, conforming to the RFP, was determined to be in the best interest of the government, price and other factors considered. The RFP placed more importance upon technical factors than cost/price, and designated 24 numerically weighted technical evaluation factors.

DEA received proposals by the October 7 closing date from Deskin and from Rockwell International Corporation, Collins Avionics & Communications Division, the original equipment manufacturer. The technical proposals were evaluated by a three-member technical evaluation panel (TEP). Based upon a 100-point scale, the TEP awarded Deskin's technical proposal a consensus score of 63.7 and adjectivally rated the proposal as "definitely unacceptable" in accordance with its rating plan. Rockwell received a score of 100 points. DEA notified Deskin, by letter dated December 21, that its proposal was rejected because it was "technically deficient and [did] not have a reasonable chance of being selected for award."

Almost 2 months later, on February 17, 1993 (apparently after some verbal communications), Deskin sent a letter to the contracting officer complaining that its proposal had been arbitrarily rejected and that the procurement was flawed. Specifically, Deskin complained that it was forced to rely solely on the quotes and equipment configurations provided by Rockwell, and that both Deskin's proposal and Rockwell's proposal should have been identical unless Rockwell had engaged in a restraint of trade. Deskin also maintained that the procurement violated free and open competition because the RFP specified Rockwell equipment by brand name. Deskin requested that DEA change the ground rules of the procurement by either (1) reissuing the procurement as a sole source to Rockwell; (2) permitting Deskin to submit a revised proposal after Rockwell offered Deskin the identical equipment, prices, and delivery schedule proposed by Rockwell or DEA furnished the Rockwell equipment as government furnished equipment; or (3) reopening the competition after replacing the brand name specifications.

In response to Deskin's letter, DEA referred Deskin's allegation that Rockwell may have engaged in an improper restraint of trade to the Antitrust Division of the

Department of Justice, as required by Federal Acquisition Regulation (FAR) § 3.301(b). In addition, DEA agreed to conduct a comprehensive review of the procurement, including the decision to eliminate Deskin's proposal from the competitive range. As a result of its review, DEA determined that there were a number of factors that suggested that Deskin's proposal had been prematurely excluded from the competitive range. Therefore, on May 10, DEA notified Deskin to disregard the earlier letter rejecting its proposal. No response was made by DEA with regard to the specific requests made by Deskin in its February 17 letter.

DEA conducted written discussions with both offerors from between May 14 and July 28, asking numerous questions of Deskin concerning the deficiencies and weaknesses in its technical proposal.<sup>1</sup> Based on its evaluation of Deskin's technical proposal and responses to the discussion questions, DEA again rejected Deskin's proposal as technically unacceptable on August 3.

On August 12, Deskin protested its elimination from the competition, alleging that Rockwell had declined to provide it with the necessary information to formulate an acceptable proposal, that DEA had failed to properly evaluate its proposal, and that DEA had improperly selected a higher-price proposal over Deskin's allegedly acceptable proposal. Following receipt of the agency report--which argued that Deskin was properly eliminated from the competition because its proposal was technically unacceptable and its price was much higher than Rockwell's price--the protester withdrew these earlier grounds of protest and protested that DEA improperly included its proposal in the competitive range.

Deskin first points to the low score it received and language in the TEP's report on initial proposals, which also stated, among other things, that Deskin's proposal was "definitely unacceptable and not susceptible of being made acceptable." Deskin next points to DEA's document reflecting the agency's decision to include its proposal in the competitive range which states, among other things, that Deskin was being put in the competitive range because "[Deskin] has raised antitrust allegations against [Rockwell], which if proven could have a significant impact on [the] procurement," from which Deskin contends that the only reason DEA included its proposal in the competitive range was to avoid an antitrust suit against Rockwell. Further, Deskin notes that DEA argued, in its report in

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<sup>1</sup>Deskin does not allege that these discussions were not meaningful.

response to Deskin's earlier protest, that Deskin's proposal was definitely technically unacceptable and that it likely would not have received award, even if technically acceptable, because of its significantly higher price.

The competitive range consists of all proposals that have a reasonable chance of being selected for award, that is, those proposals which are technically acceptable as submitted or which are reasonably susceptible of being made acceptable through discussions. FAR § 15.609(a); Mainstream Eng'g Corp., B-251444, Apr. 8, 1993, 93-1 CPD ¶ 307. FAR § 15.609(a) provides that if doubt exists as to whether a proposal is in the competitive range, the proposal should be included. On the other hand, FAR § 15.609(c) instructs the contracting officer to notify in writing an unsuccessful offeror at the earliest practicable time that its proposal is no longer eligible for award. As a general rule, an agency should endeavor to broaden the competitive range, since this will maximize the competition and provide fairness to the various offerors. Id.

Although the record suggests that DEA's initial elimination of Deskin's proposal from the competitive range was reasonable given Deskin's proposal's low relative technical rating and high price as compared to Rockwell's proposal, we find no basis to provide Deskin with relief under the circumstances of this case.

First, DEA reports that the decision to initially reject Deskin's proposal was reconsidered because it found that Deskin's low technical score did not mean that its proposal could not be made acceptable through discussions. In this connection, DEA reports that the contracting officer rejected the proposal as technically unacceptable solely on the basis of the TEP's report without independently determining the soundness of this position, that the TEP members admitted that Deskin's technically deficient proposal could be made acceptable through discussions, that Deskin's proposal did contain certain strengths, and that DEA wished to promote competition if at all feasible.<sup>2</sup> DEA reports that it only mentioned Deskin's antitrust allegations, even though it believed them to be groundless, in connection with its decision to put Deskin's proposal back into the competitive range because it was required to refer these allegations to another office for resolution and they presented the possibility, albeit remote, that Rockwell might be eliminated from the competition, leaving the agency

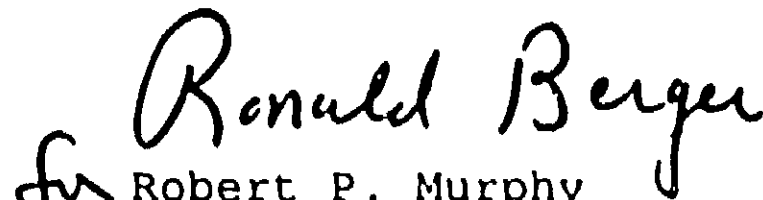
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<sup>2</sup>The record does not show whether Deskin's high price was considered at this stage.

without a potential contractor if Deskin was excluded.<sup>3</sup> In any case, our review does not indicate that DEA included Deskin's proposal in the competitive range simply to avoid antitrust litigation against Rockwell.

Second, Deskin, having sought to have its proposal put back into the competitive range, should have been fully cognizant that it would be in an "uphill battle" to have a chance at the award. See generally Modern Techs. Corp.; Scientific Sys. Co., B-236961.4; B-236961.5, Mar. 19, 1990, 90-1 CPD ¶ 301. Deskin cannot reasonably claim that it was misled into competing after it consistently sought to have the agency undertake the action that it now complains of.<sup>4</sup> While Deskin suggests that it was forced to undergo considerable time and expense in submitting a revised proposal, Deskin elected to continue to participate, despite the fact that it believed the RFP, including the specifications, favored Rockwell and that it was aware DEA had not undertaken any of the corrective actions that Deskin had asserted were necessary to allow it to have an equitable chance for award.

Under the circumstances, we conclude that Deskin is not entitled to any relief. The protest is denied.

  
 For Robert P. Murphy  
 Acting General Counsel

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<sup>3</sup>The record indicates that the Antitrust Division did not report that Deskin's allegations were groundless until after DEA had determined to include Deskin's proposal in the competitive range.

<sup>4</sup>DEA notes that, in addition to several written communications, Deskin also verbally contacted DEA on several occasions seeking to have the agency reconsider the decision to reject the initial proposal. In its February 17 letter, Deskin specifically argued that it was difficult to imagine that the Deskin proposal was so totally devoid of technical merit on all topics as to obviate the need for discussions.